

Memorandum 2000-11**Litigation Expenses in Eminent Domain (Draft of Tentative Recommendation)**

The Commission's policy determinations with regard to the award of litigation expenses in eminent domain proceedings are:

(1) The existing statute — which allows the property owner to recover litigation expenses if the property owner's final demand is reasonable and the condemnor's final demand is unreasonable — is too uncertain in its application.

(2) The existing statute should be replaced by a more objective standard — the property owner is entitled to recover litigation expenses if the award in the proceeding is closer to the property owner's final demand than to the condemnor's final offer.

Attached to this memorandum is a staff draft tentative recommendation to implement these determinations. If the Commission is satisfied with the tentative recommendation as drafted or as revised, we will circulate it for comment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Litigation Expenses in Eminent Domain

February 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 31, 2000.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

California law adopts a reasonableness standard for the award of litigation expenses, but its application is nebulous. The flexible standard does not provide adequate guidance to the parties in structuring their behavior. Worse, because the standard yields inconsistent results, it actually generates its own litigation over entitlement to litigation expenses.

The Law Revision Commission recommends that the reasonableness standard be replaced by a more specific definition. The property owner should be entitled to litigation expenses if the property owner's demand is closer to the award than the condemnor's offer. This will eliminate litigation over the issue, and provide an incentive for both parties to temper their bargaining positions and seek agreement.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

LITIGATION EXPENSES IN EMINENT DOMAIN

BACKGROUND

Existing California law provides that litigation expenses may be awarded to the property owner in an eminent domain proceeding if the final pretrial demand of the property owner was reasonable and the final pretrial offer of the condemnor was unreasonable.¹ Code of Civil Procedure Section 1250.410 provides:

1250.410. (a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

"Litigation expenses", within the meaning of this section, includes reasonable attorney fees, appraisal fees, and fees for the services of other experts.²

There is a substantial body of case law applying the standard in subdivision (b) that "the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding." In fact, this is one of the most routinely litigated provisions of the Eminent Domain Law.

The most recent Supreme Court case addressing the matter is *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corporation*.³ In that case the condemnor's final offer was \$200,000 and the property owner's final demand was \$500,000; the total compensation awarded in the proceeding was in excess of \$1,000,000. The trial court denied the property owner's motion for litigation expenses. This ruling was affirmed by the Supreme Court, which held that, based on the evidence adduced at trial and other

1. Litigation expenses may also be awarded in other situations as well. See, e.g., Code Civ. Proc. §§ 1268.610-1268.620 (litigation expenses and damages upon dismissal or defeat of right to take).

2. Code Civ. Proc. § 1235.140.

3. 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997).

1 considerations, the trial court did not exceed the bounds of reason in denying the
2 property owner's motion.

3 Cases applying the statute do not always appear to provide a consistent
4 interpretation of the standard announced in the statute. In light of the disparity
5 between the statutory language and the case law application of it, the Law
6 Revision Commission recommends a more precise statutory formulation of the
7 applicable law.

8 EXISTING CASE LAW

9 Existing case law has developed three factors a court must consider in
10 determining whether the demand of the property owner was reasonable and the
11 offer of the condemnor was unreasonable:

12 (1) The amount of the difference between the offer and the compensation
13 awarded.

14 (2) The percentage of difference between the offer and award.

15 (3) The good faith, care, and accuracy in how the amount of offer and the
16 amount of demand were determined.

17 No one of these factors alone may serve as the basis for a determination of
18 reasonableness or unreasonableness.

19 Thus in *Continental Development*, where the amount offered was \$200,000 and
20 the amount awarded exceeded \$1,000,000, the court held that the difference
21 between the offer and award was not the exclusive determinant of reasonableness
22 and that, taking into account the weak testimony of the property owner's expert
23 witness on a key issue in the case, the condemnor "cannot be said to have made its
24 offer unreasonably or in bad faith."⁴

25 A trial court has considerable discretion whether to make an award of litigation
26 expenses based on the facts in the case. The standard of review employed by an
27 appellate court is whether the trial court has abused its discretion in awarding or
28 denying litigation expenses. As the Supreme Court expressed it in *Continental*
29 *Development*, the trial court did not "exceed the bounds of reason" in denying
30 litigation expenses to the property owner.⁵

31 It is instructive to examine each of the factors a court is required to consider in
32 making a reasonableness determination.

33 Amount of Difference between Offer and Award

34 Although the absolute dollar difference between the condemnor's final offer and
35 the amount awarded is to be considered by the court, this appears in practice to be
36 the least significant of the factors. Thus, a jury verdict that was \$16,000 greater
37 than the condemnor's offer was thought to be sufficiently great to justify an award

4. 66 Cal. Rptr. 2d at 648.

5. Ibid.

of litigation expenses in *County of Los Angeles v. Kranz*⁶ but a difference of \$800,000 in *Continental Development* was not. A recent Court of Appeal decision features an absolute dollar difference of \$950,000, but the court notes that it must go on to examine the reasonableness of the condemnor's behavior before concluding that an award of litigation expenses to the property owner is warranted.⁷

Percentage of Difference between Offer and Award

Older cases adhere to a mathematical determination of reasonableness — an offer that is less than 60% of the compensation awarded is deemed unreasonable, while an offer that is greater than 85% of the compensation awarded is per se reasonable. More recent cases reject such a strict mathematical approach:⁸

We need say little more about this issue other than to note our disapproval of any pronouncement purporting to find unreasonableness as a matter of law based purely on mathematical disparity, and to commend the lower courts in every case to consider not only the numerical figures, but also “the good faith, care and accuracy in how the amount of the offer and the amount of the demand, respectively, were determined.” [Citations.]”

In *Continental Development*, a final offer that was less than 18% of the compensation awarded was found to be reasonable based on the condemnor's good faith, care, and accuracy in making the offer.

Good Faith, Care, and Accuracy in Determination of Offer and Demand

The dominant factor that has emerged in the courts' determination of reasonableness is the good faith, care, and accuracy in how the amount of the offer and the amount of the demand were determined. Offers that have been low in relation to the compensation awarded have been held to be sufficiently reasonable that litigation expenses should not be awarded.

Specific factors cited in the cases that have been the basis of a determination that a low offer was reasonable have included such matters as:⁹

- Condemnor used well-qualified appraiser who employed comparable properties.
- Condemnor and appraiser did not try to keep appraisal low.
- Condemnor honestly believed that property owner's demand included noncompensable damages.
- Condemnor reviewed property owner's appraisal and met with appraiser to determine basis of demand.
- Property owner failed to offer expert support for demand.

6. 65 Cal. App. 3d 656 (1977).

7. *Ventura County Flood Control District v. Campbell*, 83 Cal. Rptr. 2d 725 (1999).

8. *Continental Development*, 16 Cal. 4th at 720-721.

9. See, e.g., *Turner*; *San Diego Metro. Transit Dev. Bd. v. Cushman*, 53 Cal. App. 4th 918, 62 Cal. Rptr. 2d 121 (1997); *People ex rel. Dep't of Transp. v. Yuki*, 31 Cal. App. 4th 1754, 37 Cal. Rptr. 2d 616 (1995).

1 Specific factors cited in the cases that have been the basis of a determination that
2 an offer was unreasonable have included such matters as:¹⁰

- 3 • Condemnor unwilling to compromise.
- 4 • Condemnor ignored expert opinion offered by property owner.
- 5 • Condemnor engaged in gamesmanship in timing of and basis for offer.
- 6 • Condemnor used artificial “legal issue” as basis for low offer.

7 HISTORY OF SECTION 1250.410

8 Code of Civil Procedure Section 1250.410 was first enacted in 1974, under
9 sponsorship of the State Bar, as Code of Civil Procedure Section 1249.3. As
10 enacted, it provided that in determining reasonableness, the court was to consider
11 the amounts offered and demanded in light of the compensation awarded.

12 In the 1975 revision of the Eminent Domain Law, that provision was reenacted
13 as Code of Civil Procedure Section 250.410, with the added requirement that
14 reasonableness also be determined “in the light of the evidence admitted”. This
15 addition was made during the legislative process at the request of the Department
16 of Transportation. The Department pointed out that the litigation expenses
17 provision is a one-way street — expenses can only be awarded against the
18 condemnor, not against the property owner. Moreover, the provision fails to
19 provide sufficient standards to guide the trial judge. As a practical matter, the
20 condemnor can only offer the amount of its appraisal or slightly more — if the
21 offer is accepted, there must be a justifiable basis for the expenditure of that
22 amount of public funds. But the property owner is not bound by this constraint; in
23 many cases the value testimony offered by the property owner will be substantially
24 above the owner’s demand. “Under these circumstances and considering the
25 tendency of juries to ‘split the difference’ in complex cases, the condemning
26 agency is at a distinct disadvantage.”¹¹

27 In response, language was added enabling the judge to consider the offer and
28 demand in light of the testimony that was weighed by the jury in arriving at a
29 determination of just compensation. The practical effect of this provision was
30 correctly predicted by the Department of Transportation in its letter proposing it:¹²

31 With the suggested amendment and in cases where the difference between the defendant’s
32 demand and the defendant’s testimony is substantial, a judge could conclude that a verdict in an

10. See, e.g., *County of Los Angeles v. Kranz*, 65 Cal. App. 3d 656, 135 Cal. Rptr. 473 (1977); *Community Redevelopment Agency v. Krause*, 162 Cal. App. 3d 860, 209 Cal. Rptr. 1 (1984); *California ex rel. State Pub. Works Bd. v. Turner*, 90 Cal. App. 3d 33, 153 Cal. Rptr. 156 (1979); *San Diego Gas & Elec. Co. v. Daley*, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988); *Glendale Redevelopment Agency v. Parks*, 18 Cal. App. 4th 1409, 23 Cal. Rptr. 2d 14 (1993); *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 121 (1997).

11. Letter to California Law Revision Commission from Department of Transportation, May 5, 1975 (copy on file in office of Law Revision Commission).

12. *Ibid.*

1 amount in excess of plaintiff's offer and perhaps even in excess of defendant's demand would not
2 warrant an allowance of costs and litigation expenses.

3 It should be noted, however, that even without the "evidence admitted"
4 language, the original Code of Civil Procedure Section 1249.3 gave no clear
5 guidance to courts. An analysis of the provision as first enacted in 1974 concludes,
6 "The statute does not contain guidelines to aid the parties or the courts in
7 determining the reasonableness of the final offers."¹³ Moreover, the "good faith,
8 care, and accuracy" standard currently used by the courts, and the broad discretion
9 given the trial court, were first developed by the courts applying former Section
10 1249.3 as originally enacted.¹⁴ The addition of the "evidence admitted" language
11 is considered merely a codification of the pre-existing interpretation of the
12 statute.¹⁵

13 IMPROVEMENT OF THE LAW

14 The extensive litigation that occurs over award of litigation expenses in eminent
15 domain is due in part to the lack of clear standards in the law. A reasonableness
16 determination based on "good faith, care, and accuracy" is necessarily subjective
17 and litigious. The standard generates inconsistent results, derived from trial court
18 determinations unstructured by objective standards.

19 The lack of clear standards for an award of litigation expenses also undercuts the
20 purpose of the statute to require the parties to temper their positions and perhaps
21 achieve a resolution of the dispute without the need for an eminent domain trial.
22 The statute is intended to motivate the parties to behave reasonably for fear of the
23 litigation expense sanction. But if that sanction is readily avoided by application of
24 a nebulous and unpredictable consideration of good faith, care, and accuracy, the
25 purpose of the statute is frustrated. The law provides no added inducement to
26 settlement.

27 The existing litigation expense scheme disadvantages not only the parties, but
28 also the public. Courtroom costs for eminent domain proceedings are significant
29 — the cases involve complex valuation issues involving expert testimony, tried

13. *Review of Selected 1974 California Legislation*, 6 Pac. L. J. at 381 (1975).

14. See, e.g., *City of Los Angeles v. Cannon*, 57 Cal. App. 3d 559, 562, 127 Cal. Rptr. 709 (1976) ("It seems to us that reasonableness depends not only on the monetary amounts or the percentage of difference. Reasonableness depends also on the good faith, care and accuracy in how the amount of the offer and the amount of the demand respectively, were determined. These are factual determinations best made by the trial court that heard the evidence relative thereto."); *County of Los Angeles v. Kranz*, 65 Cal. App. 3d 656, 659, 135 Cal. Rptr. 473 (1977) ("[R]easonableness depends on the proportional difference between offer and demand, the absolute monetary amounts, and the good faith, care, and accuracy in the method of determination of offer and demand.").

15. See *People ex rel. Dept. of Transp. v. Societa Di Unione E Beneficenza Italiana*, 87 Cal. App. 3d 14, 23, 150 Cal. Rptr. 706 (1978).

1 before a jury.¹⁶ Recent statistics show an average jury trial time of 9.4 days for an
2 eminent domain proceeding, at an estimated cost to the court system of \$30,500.¹⁷

3 Existing law is costly to all concerned. It is inconsistent and unpredictable in its
4 operation. It promotes rather than discourages litigation. It should be replaced by a
5 statute that provides clearer and more useful standards.

6 A property owner's litigation expenses are not reimbursable as a matter of
7 constitutional right.¹⁸ The Legislature has a free hand in fashioning a statutory
8 system that will encourage fair settlements and make whole a property owner that
9 is unreasonably required to litigate in order to obtain just compensation for the
10 property taken.

11 OTHER JURISDICTIONS

12 Other jurisdictions employ a variety of approaches with respect to litigation
13 expenses in eminent domain litigation.

14 State Law

15 State laws vary tremendously in the extent to which the property owner's
16 litigation expenses are compensable in eminent domain.¹⁹ Typically litigation
17 expenses are allowed if the property owner defeats the right to take or the
18 condemnor abandons the proceeding. Litigation expenses are also allowed in many
19 jurisdictions if the property owner prevails on appeal.

20 A number of states (like California) allow the property owner to recover
21 litigation expenses in circumstances where the property owner is inappropriately
22 forced to litigate valuation issues. States may limit the type and amount of
23 litigation expenses that are compensable, may limit the proceedings in which they
24 are compensable (such as highway acquisitions), or apply a myriad of other

16. Cal. Const. Art. I, § 14.

17. Schaffer & Kelso, *Jury Verdicts in California Eminent Domain Cases: Some Descriptive Statistics* (Inst. Leg. Prac. 1999). This statistic does not take into account the very substantial imposition on jurors and prospective jurors summoned to resolve the valuation dispute.

18. See, e.g., *County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 148-149 (1971):

In resolving this dilemma, as we must, we are impressed with the authorities which are almost unanimously in agreement that there is no constitutional compulsion to award litigation costs to a landowner in a condemnation proceeding; defendants have not offered any persuasive justification for overruling this virtually unbroken line of interpretive decisions. It follows that since allowable costs are of policy as distinguished from constitutional dimension, determination of costs which are permissibly recoverable remains with the Legislature rather than the courts. [fn]

[fn]: The Legislature appears to be aware of the problems involved in the present cost-allocation system. The California Law Revision Commission has made a study of the issue and a number of imaginative solutions have been suggested to it.

19. Comprehensive summaries of applicable state law on the issue may be found in such sources as 8A *Nichols on Eminent Domain* 3d § 15.02 (1999); Munyan, *State Provisions on the Recovery of Litigation Expenses in Eminent Domain Proceedings* (Va. Div. Leg. Serv. Aug. 22, 1999); Milstein, *Awarding Attorney's Fees in Eminent Domain Actions* (Inst. Leg. Prac. 1999).

1 conditions or limitations that defy ready summary. The approaches used in states
2 that appear to provide a general remedy are categorized roughly below.

3 **Award exceeds condemnor's offer.** At least ten states provide for the property
4 owner's litigation expenses if the award exceeds the condemnor's offer. The
5 amount by which the award must exceed the offer in order to trigger the allowance
6 varies from state to state, including:

7 110% — Iowa

8 20% — South Dakota

9 10% — Alaska, Washington

10 Any amount — Florida,²⁰ Indiana,²¹ Louisiana, Michigan,²² Montana, Oregon²³

11 **Condemnor's bad faith.** Several states, including Arkansas, Kentucky, and
12 Oregon, allow litigation expenses on a demonstration of the condemnor's bad
13 faith, or at least make bad faith an express element of the formula.

14 **Court discretion.** A number of states allow attorney's fees in the court's
15 discretion, or provide for litigation expenses subject to denial in the court's
16 discretion, with various prerequisites to exercise of the court's discretion, such as
17 reasonableness or unreasonableness of the parties' conduct or the need to ensure
18 just and adequate compensation to the property owner. These states include
19 Delaware, Idaho, New York, North Dakota, and South Dakota.

20 **Federal Law**

21 Under the federal Equal Access to Justice Act,²⁴ the property owner is allowed
22 litigation expenses if the property owner is the "prevailing party" in the case,
23 unless the court determines that the government's position was substantially
24 justified or that special circumstances make the allowance unjust.

25 "Prevailing party" within the meaning of this statute is the party whose
26 testimony in court is closest to the actual award in the case. But even if the
27 property owner is the prevailing party, litigation expenses are not awarded if there
28 was substantial justification for the condemnor's position. This issue has become
29 highly litigated. The courts have applied a reasonableness test to determine
30 whether the condemnor's position was "justified in law and fact", taking into
31 account the totality of the circumstances. Factors entering into the reasonableness
32 determination include:

- 33 • The condemnor's good faith efforts to settle.
- 34 • The reasonableness and reliability of the condemnor's appraisals introduced
35 into evidence.

20. Based on "benefits achieved" by attorney for property owner, as measured by increase obtained over condemnor's offer, but limited by a sliding scale percentage recovery.

21. Indiana limits recovery of litigation expenses to \$2,500.

22. Michigan limits recovery to 1/3 of overage.

23. Oregon also allows fees on a showing of condemnor's bad faith.

24. 28 USC § 2412.

1 • A comparison of the condemnor's appraisal, the offer made, and proof of
2 valuation at trial.

3 • Any other relevant evidence.

4 These factors are reminiscent of those applied in California.

5 There are other impediments to recovery of litigation expenses under the federal
6 Equal Access to Justice Act, including limitations on the types of parties who can
7 recover and limitations on the amount of fees that can be recovered. The net effect
8 is that the statute's threshold requirements "rarely allow attorney fee
9 reimbursement in eminent domain."²⁵

10 AN OBJECTIVE STANDARD

11 The Law Revision Commission believes the existing California statute on award
12 of litigation expenses — based on the reasonableness of a party's offer or demand
13 — requires revision. Although sound in theory, the subjective standard does not
14 appear to fulfill its intended function of diverting from litigation cases that should
15 be settled. Instead, it yields unpredictable results, with minimal incentive for the
16 parties to strive for an out of court resolution of the dispute. In fact, the current
17 standard appears actually to be counterproductive — it generates additional
18 litigation over whether an award of litigation expenses is warranted in a particular
19 case. The standard encourages parties to concentrate on creating a paper record of
20 "reasonableness" in anticipation of a future dispute on the matter, rather than on
21 striving for a resolution of their differences. A more objective standard for award
22 of litigation expenses is warranted.

23 The Commission has examined models in other jurisdictions that employ a more
24 objective standard — typically the award of litigation expenses where the award
25 exceeds the condemnor's offer, or exceeds the offer by a specified amount or
26 percentage. Such a provision would help eliminate litigation over the issue, as well
27 as create a strong incentive for the condemnor to settle the case. The Commission
28 is not satisfied, however, that this approach is fair to both parties or that it even-
29 handedly encourages reasonable behavior.

30 Take as an example a condemnor's final offer of \$100,000 and property owner's
31 final demand of \$200,000. The property owner must litigate in order to receive the
32 just compensation to which the property owner believes it is entitled. If the just
33 compensation awarded after trial is \$125,000, the condemnor could be required to
34 pay the property owner's litigation expenses, even though the condemnor's offer
35 was more "reasonable" (i.e. closer to the amount of just compensation actually
36 determined in the case) than the property owner's demand. There is little incentive
37 here for the property owner to behave reasonably. The incentive is directed
38 primarily towards the condemnor to meet the property owner's demand.

25. 8A *Nichols on Eminent Domain* 3d § 15.03[1] (1999).

1 The need for a more even-handed formula is apparent from the available
2 statistics on awards in eminent domain proceedings.²⁶ California eminent domain
3 awards tend to fall in the middle range between the final offer of the condemnor
4 and final demand of the property owner. Jury verdicts average 10% higher than the
5 midway point (and 41% higher than the condemnor's offer), and bench verdicts
6 come in 1% below the midway point (and 33% higher than the condemnor's
7 offer).

8 A more equitable formula, and one that would apply equal pressure to both sides
9 to temper their offers and demands, would allow the property owner's litigation
10 expenses if the award is closer to the property owner's final demand than to the
11 condemnor's final offer. This is analogous to the standard applied in a number of
12 jurisdictions.²⁷ However, the other jurisdictions base the award on testimony at
13 trial, rather than on offers and demands of the parties. Because the main purpose of
14 the litigation expense remedy is to encourage reasonable behavior of the parties in
15 an effort to avoid the need for litigation (or put another way, to help make the
16 property owner whole if unreasonably compelled to litigate in order to obtain just
17 compensation), the standard should be based on pretrial, rather than trial, behavior
18 of the parties.

19 FISCAL EFFECT OF OBJECTIVE STANDARD

20 Effect on Condemnor Acquisition Costs

21 How would the proposed revision of the litigation expense standard affect
22 condemnor acquisition budgets, if at all? Any prediction is necessarily speculative,
23 but there are some discernible factors at work.

24 The literature indicates that a statute providing an award of litigation expenses to
25 the property owner, where none existed before, may create a disincentive for the
26 property owner to settle. The few available statistics show a decrease in negotiated
27 purchases where a litigation expense statute is enacted: "A review of states that
28 had recently adopted attorneys' fees provisions (California, Pennsylvania and
29 Louisiana) indicates, though not conclusively, that the percentage of parcels
30 acquired by negotiations will decline but not significantly upon the adoption of

26. Schaffer & Kelso, *Jury Verdicts in California Eminent Domain Cases: Some Descriptive Statistics* (Inst. Leg. Prac. 1999).

27. See, e.g., Del. Code Ann. tit. 10, § 6111 (award "closer to the highest valuation evidence provided at trial on the defendant's behalf than the plaintiff's offer"); So. Car. Code § 28-2-510(B) (award "is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor"); 28 U.S.C. § 2412(2)(H) (award "is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the government").

1 such a provision.”²⁸ This presumably would result in somewhat higher condemnor
2 costs, both in terms of increased litigation and higher awards, as well as in
3 payment of the property owner’s litigation expenses.

4 There are no data readily available on the effect of a change in the standard for
5 awarding litigation expenses. A natural assumption would be that a move from the
6 existing subjective standard in California (which enables the condemnor to avoid
7 litigation expenses in many cases) to a more objective standard would result in
8 condemnors paying more litigation expenses. But this is not a necessary result. If
9 the proposed bright line rule has its intended effect of promoting settlements, it
10 could result in savings to the condemnor. A settlement at very least saves the
11 condemnor its own litigation expenses, not to mention the danger of a trial verdict
12 awarding compensation higher than the proposed settlement. In addition the
13 proposed standard would all but eliminate litigation over the issue of litigation
14 expenses itself — a not insignificant factor under existing California law.

15 The available statistics for California eminent domain proceedings indicate that
16 eminent domain awards tend to fall fairly closely in the middle range between the
17 final offer of the plaintiff and final demand of the defendant.²⁹ These statistics
18 suggest that, even if the parties do not change their behavior at all in response to
19 the new standard, its application will not result in a substantial shift in the burden
20 of litigation expenses. A more likely result of the new standard will be push the
21 parties’ offers and demands into a narrower range, with a consequent diminution
22 in the number of cases that go to trial and become eligible for an allowance of
23 litigation expenses.

24 **Cost Impact on Court System**

25 Apart from the question whether a bright-line standard for awarding litigation
26 expenses will increase condemnor acquisition costs, there may be savings to the
27 public in the form of decreased court costs resulting from settlements. A system
28 that provides clear standards and an incentive for settlement may eliminate
29 needless burdens on all parties, including the courts. A decision to litigate, rather
30 than settle, may appear to be fiscally sound to the condemnor, but this is due in
31 part to the fact that it shifts some of the condemnor’s acquisition costs to another
32 sector of the public — the court system.³⁰

33 The most recent statistical information available shows an estimated cost to the
34 public of \$30,500 for an average eminent domain award.³¹ These numbers suggest

28. Munyan, *State Provisions on the Recovery of Litigation Expenses in Eminent Domain Proceedings* 9 (Aug. 24, 1999), citing Dobson, *Payment of Attorney Fees in Eminent Domain and Environmental Litigation* 728-729 (Transportation Research Board, ALI/ABA 1979).

29. See text at note 26, *supra*.

30. Cf. *People v. Voltz*, 25 Cal. App. 3d 480, 487 (1972) (“Any profit to the state highway fund would be weighed in the balance against the increased cost of court operation. One segment of government would pay for the tactical choices of another.”)

31. See fn. 17, *supra*.

1 that the proposed litigation expense statute should result in significant savings to
2 the public, regardless of cost to a particular condemnor.

3 CONCLUSION

4 Two competing public policies inform every aspect of eminent domain law —
5 the need of the public to acquire property for public use (and the function of the
6 law to facilitate this), versus the right of the property owner whose property is
7 forcibly taken to full and fair compensation for it. As these policies play out in the
8 context of eminent domain litigation expenses, the law should provide a solution
9 that encourages the parties to act reasonably in their effort to resolve the valuation
10 dispute. Unnecessary litigation imposes unwarranted costs not only on the parties
11 but also on the public; a property owner should not be required to bear the cost of
12 litigation merely to obtain the just compensation to which it is reasonably and
13 constitutionally entitled.

14 Paradoxically, current California law explicitly adopts a reasonableness standard
15 for the award of litigation expenses, but its application is nebulous. The flexible
16 standard does not provide adequate guidance to the parties in structuring their
17 behavior. Worse, because the standard yields inconsistent results, it actually
18 generates its own litigation over entitlement to litigation expenses. An effort to
19 more precisely describe what behavior will be considered reasonable is warranted.

20 The Law Revision Commission recommends that the reasonableness standard be
21 replaced by a more objective standard. The property owner should be entitled to
22 litigation expenses if the award is closer to the property owner's demand than to
23 the condemnor's offer. This will eliminate litigation over the issue, and provide an
24 incentive for both parties to temper their bargaining positions and seek agreement.

PROPOSED LEGISLATION

1 An act to amend Section 1250.410 of the Code of Civil Procedure, relating to
2 eminent domain.

3 *The people of the State of California do enact as follows:*

4 **Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers**

5 Section 1. Section 1250.410 of the Code of Civil Procedure is amended to read:

6 1250.410. (a) At least 20 days prior to the date of the trial on issues relating to
7 compensation, the plaintiff shall file with the court and serve on the defendant its
8 final offer of compensation in the proceeding and the defendant shall file and serve
9 on the plaintiff its final demand for compensation in the proceeding. Such offers
10 and demands shall be the only offers and demands considered by the court in
11 determining the entitlement, if any, to litigation expenses. Service shall be in the
12 manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of
13 Part 2.

14 (b) If the court, on motion of the defendant made within 30 days after entry of
15 judgment, finds that ~~the offer of the plaintiff was unreasonable and that the~~
16 ~~demand of the defendant was reasonable viewed in the light of the evidence~~
17 ~~admitted and the compensation awarded in the proceeding is closer to the demand~~
18 of the defendant than to the offer of the plaintiff, the costs allowed pursuant to
19 Section 1268.710 shall include the defendant's litigation expenses.

20 In determining the amount of such litigation expenses, the court shall consider
21 the offer required to be made by the plaintiff pursuant to Section 7267.2 of the
22 Government Code and any other written offers and demands filed and served prior
23 to or during the trial.

24 (c) If timely made, the offers and demands as provided in subdivision (a) shall
25 be considered by the court on the issue of determining an entitlement to litigation
26 expenses.

27 **Comment.** Section 1250.410 is amended to replace the "reasonableness" standard with an
28 objective standard for determining entitlement to litigation expenses. It should be noted, however,
29 that the reasonableness of the written offers and demands of the party may enter into a
30 determination of the amount of litigation expenses, pursuant to the second paragraph of
31 subdivision (b). Moreover, the amount of litigation expenses allowable is limited to those
32 reasonably and necessarily incurred by the defendant in the proceeding. See Section 1235.140
33 ("litigation expenses" defined).